Double D Mining, Inc. *and* International Union of Operating Engineers, Local 627, AFL-CIO. Cases 16-CA-9121 and 16-CA-9263

August 24, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon charges filed on May 6, 1980, in Case 16-CA-9121 and July 17, 1980, in Case 16-CA-9263, by International Union of Operating Engineers, Local 627, AFL-CIO, herein called the Union, and duly served on Double D Mining, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 16, issued an order consolidating cases and a consolidated complaint on September 12, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges and the consolidated complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent failed to file a timely answer.

With respect to the unfair labor practices, the consolidated complaint alleges in substance that Respondent interrogated its employees about their union activities; threatened them with various reprisals, including plant closure, discharge, and violence, because of their support for the Union; discharged or laid off the unit employees and refused to reinstate them because of their union activity; and refused to bargain with the Union, though requested to do so, as the duly certified collective-bargaining representative of its employees in the unit found appropriate. The consolidated complaint also alleges that Respondent has refused to bargain with the Union by unilaterally terminating the bargaining unit employees and shutting down its mine and reopening it under the operation of a contractor from out of State.

On November 5, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment based on Respondent's failure to file an answer as required by Section 102.20 of the Board's Rules and Regulations, Series 8, as amended. Thereafter, on November 17, 1980, the Board issued an order transferring the matter to the Board and a Notice To Show Cause why the Motion for Summary Judgment should not be granted. Respondent did not file a response to the Notice To Show Cause and, accordingly, the allegations of the Motion for Summary Judgment stand uncontroverted.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The consolidated complaint and notice of hearing served on Respondent specifically states that, unless an answer to the consolidated complaint is filed within 10 days from service thereof, "all of the allegations in the consolidated complaint shall be deemed to be admitted to be true and may be so found by the Board." According to the uncontroverted allegations of the Motion for Summary Judgment and exhibits attached, a copy of the order consolidating cases and the consolidated complaint and notice of hearing was served on September 15, 1980, by regular mail upon Dallis Addis, Respondent's alleged owner, and by certified mail upon attorney Stephen Andrew, as Respondent's representative. By letter of the same date, attorney Andrew advised Addis that a timely answer was due on or before September 22, 1980, or summary judgment would be taken against the Company, and that he was not in a position to file such an answer because he had not been requested to represent Respondent in this matter. Further, according to the Motion for Summary Judgment, when no timely answer was filed, counsel for the General Counsel called the offices of both Addis and attorney Gene (Mike) Kelly, as representatives of Respondent, and in the call to Addis' office his secretary was advised of the General Counsel's intention to file a Motion for Summary Judgment

unless an answer was received. On October 20, 1980, counsel for the General Counsel forwarded a letter, via certified mail, to Addis and attorney Kelly, requesting prompt filing of an answer.

On October 24, 1980, a letter was received from Loretta Mapes, Respondent's personnel manager, requesting an extension of time in which to file an answer. By certified mail, the Acting Regional Director for Region 16 voluntarily extended such time until the close of business on October 30, 1980, warning Respondent that, unless an answer was received within that time, a Motion for Summary Judgment would be made. Thereafter, on November 5, 1980, no answer having been received, counsel for the General Counsel filed the instant Motion for Summary Judgment.

On November 21, 1980, the Board received a letter from attorney Kelly, requesting that Respondent be allowed to file its answer out of time, because a "unique blend of circumstances" had led to Respondent's delay in presenting its answer. There was no affidavit of service showing service on the parties of this letter and no other indication that service was made. On December 3, 1980, attorney Kelly made an additional request for an extension of time. The Board subsequently granted an extension of time to file an answer to December 22, 1980. No answer to the complaint was timely filed.[1]

As noted, Respondent did not file a timely answer to the complaint, despite the extensions granted by the Acting Regional Director and the Board; nor did it file a response to the Notice To Show Cause. No good cause to the contrary having been shown, in accordance with the rule set forth above, the allegations of the complaint are deemed to be admitted and found to be true. Accordingly, we grant the Motion for Summary Judgment.

Upon the entire record in this proceeding, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, Double D Mining, Inc., is, and has been at all times material herein, an Oklahoma corporation, with offices located at Route 4, Box 279, Claremore, Oklahoma, where it is engaged in the business of strip mining. During the 12-month period preceding issuance of the consolidated complaint, a representative period, Respondent, in the course and conduct of its business operations shipped goods valued in excess of $50,000 directly to customers located outside the State of Oklahoma.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local 627, AFL-CIO, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The 8(a)(5) and (1) Violations*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Double D Mining, Inc., at its Blue Creek No. 1 mine located four miles west of Foyil, Oklahoma, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On or about March 4, 1980, a majority of the employees of Respondent in the appropriate unit, by a secret-ballot election conducted under the supervision of the Regional Director for Region 16, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent, and since that date the Union has been the exclusive representaive of said employees within the meaning of Section 9(a) of the Act.[2] On June 23, 1980, the National Labor Relations Board certified the Union as the exclusive collective-bargaining representative of the employees in said unit.

Commencing on March 4, 1980, the Union was available and prepared to bargain with Respondent, and on or about June 27, 1980, and at all times thereafter, it has requested Respondent to bargain collectively with it as the collective-bargaining rep-

[1] On January 15, 1980, Respondent filed a pleading entitled "Reply to Order Consolidating Cases, Consolidated Complaint and Notice of Hearing," after which counsel for the General Counsel filed a response to the untimely reply of Respondent. By letter, dated January 30, 1981, the Associate Executive Secretary advised attorney Kelly that since, the document was received outside the extended time, it could not be forwarded to the Board for consideration.

[2] See *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., et. al.*, 209 NLRB 701, 703 (1974), enforcement denied on other grounds 512 F.2d 684 (8th Cir. 1975), and the cases cited at fns. 10 and 11 of said Board Decision.

resentative of all the employees in the appropriate unit.

Commencing on or about March 4, 1980, and at all times thereafter, Respondent refused, and has continued to refuse, to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit in that, without notification to or consultation with the Union, Respondent unilaterally, on March 4, laid off or terminated all bargaining unit employees and shut down its Blue Creek No. 1 mining operation, and, thereafter, in June 1980, reopened that mine under the operation of an out-of-state contractor. Respondent also refused to bargain with the Union when, on July 3, 1980, it advised the Union that it would not bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

Accordingly, we find that Respondent has, since March 4, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, in the manner set forth above, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

B. *The 8(a)(3) and (1) Violations*

On or about January 22, 1980, Respondent discharged its employee Robert P. Tice, and, on or about March 4, 1980, discharged or laid off its employees Bill Dewitt, Ronnie Potter, Teddy Ross, Michall Mittrell, David Williams, Buddy Smith, Ronald Hayworth, Roy Hey, Chris Hughes, Samuel Adams, and Larry Nutter, and at all times material herein has refused to reinstate them. Respondent discharged or laid off and failed or refused to reinstate the aforenamed employees because they engaged in activity on behalf of the Union or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Accordingly, we find that, by discharging or laying off and refusing to reinstate the above-named employees, Respondent has discriminated against its employees in regard to their terms and conditions of employment, and that, by such conduct, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

C. *The Independent 8(a)(1) Violations*

On or about December 20, 1979, and January 3 and March 4, 1980, Respondent interrogated its employees concerning their union activities and desires, and the union activities and desires of other of its employees. On or about December 20 and 21, 1979, and January 3 and 10 and March 4, 1980, Respondent threatened to close the mine down if the employees voted in the Union, and during the period of January 15 to 22, 1980, told an employee of having made more arduous, onerous, and less desirable work assignments to employees in order to discourage them from becoming or remaining members of the Union or giving any assistance or support to it. On March 3, 1980, Respondent threatened to break an employee's legs, and, on March 4, 1980, threatened its employees with discharge or other reprisals if they became or remained members of the Union or gave any assistance or support to it.

Accordingly, we find that by the aforesaid conduct Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and that, by such conduct, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. Thus, we shall order it to restore the *status quo ante* by reestablishing its own operation of the Blue Creek No. 1 mine and reinstating the unlawfully discharged or laid-off employees to their former positions or substantially equivalent positions of employment, making them whole for any losses resulting from the discrimination practiced against them by paying them backpay from the date of their unlawful discharge or layoff to the date Respondent offers them full and proper reinstatement.[3] Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and interest shall be paid on all backpay as prescribed in *Florida*

[3] See *Townhouse T.V. & Appliances*, 213 NLRB 716 (1974).

Steel Corporation, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

We shall also order Respondent to recognize and bargain with the Union as the representative of its employees in the appropriate unit, and embody any understanding reached in a signed agreement. Finally, we shall require Respondent to cease and desist from in any other manner interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act. By its unfair labor practices, Respondent has shown an utter disregard of those employee rights and the principles and purposes of the Act. Consequently, we conclude that such broad injunctive relief is necessary to fully expunge the effects of Respondent's unlawful conduct.[4]

In order to insure that the employees will be accorded the statutorily prescribed services of their selected bargaining agent for the period provided by law, we shall construe the initial year of certification to begin on the date that Respondent complies with the Order set forth below. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce d/b/a Lamar Hotel*, 140 NLRB 226 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

In addition to requiring Respondent to post copies of the notice, we shall order it to mail copies of the notice to each employee employed by it in the appropriate unit at his last known address. We find this requirement warranted in light of Respondent's unlawful shutdown of the plant and termination of the unit employees, and the extensiveness of Respondent's unfair labor practices, all of which were motivated by a desire to rid itself of the Union. This will insure that all the employees will be apprised of the unlawful nature of Respondent's acts and assure that they will not be repeated.[5]

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Double D Mining, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 627, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by Double D Mining, Inc., at its Blue Creek No. 1 mine located 4 miles west of Foyil, Oklahoma, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining purposes within the meaning of Section 9(b) of the Act.

4. Since on or about March 4, 1980, the Union has been the exclusive representative of the employees in the appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act, and since June 23, 1980, has been and now is the certified and exclusive representative of said unit employees.

5. By refusing on or about March 4, 1980, and at all times thereafter, including July 23, 1980, to bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By unilaterally, without notification to or consultation with the Union, laying off or terminating all bargaining unit employees, shutting down its Blue Creek No. 1 mining operation, and subsequently reopening it under the operation of a subcontractor, Respondent has refused to bargain collectively with the Union, as the exclusive representative of all the employees in the appropriate unit, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By on or about January 22, and March 4, 1980, discharging or laying off its employees Robert P. Tice, Bill DeWitt, Ronnie Potter, Teddy Ross, Michall Mittrell, David Williams, Buddy Smith, Ronald Hayworth, Roy Hey, Chris Hughes, Samuel Adams, and Larry Nutter and thereafter failing or refusing to reinstate them because they engaged in activity on behalf of the Union or in other protected concerted activity, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

8. By interrogating the employees in the appropriate unit concerning their union activities and desires, and the union activities and desires of its other employees; by threatening to close the mine down if the employees voted the Union in, and telling an employee of having made less desirable work assignments to employees in order to discourage them from becoming members of the Union or giving any assistance or support to it; by threatening to break the legs of an employee; and by threatening its employees with discharge or other reprisals if they became or remained members of the Union or gave any assistance or support to it,

[4] See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[5] *Eastern Maine Medical Center*, 253 NLRB 224 (1980).

Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Double D Mining, Inc., Claremore, Oklahoma, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with International Union of Operating Engineers, Local 627, AFL-CIO, herein the Union, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by Double D Mining, Inc., at its Blue Creek No. 1 mine located four miles west of Foyil, Oklahoma, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Refusing to bargain collectively with the Union by shutting down its Blue Creek No. 1 mining operation, terminating the unit employees, and reopening the mine under the operation of a subcontractor, or by making any other changes in the terms or conditions of employment of the unit employees without first notifying and consulting with the Union and affording it the opportunity to bargain about those subjects.

(c) Discharging, laying off, or otherwise discriminating against employees in the appropriate unit and failing and refusing to reinstate them because they engaged in activity on behalf of the Union or other concerted activity for the purpose of collective bargaining or other mutual aid or protection.

(d) Interrogating its employees about their union activities and desires and the union activities and desires of other of its employees.

(e) Threatening to close its Blue Creek No. 1 mine if the employees voted the Union in.

(f) Threatening employees by telling them of having made more arduous, onerous, and less desirable work assignments to its employees in order to discourage them from becoming or remaining members of the Union or giving any assistance or support to it.

(g) Threatening to break the legs of any of its employees or to engage in any other violence against its employees because of their union or other concerted activity for the purpose of collective bargaining or mutual aid or protection.

(h) Threatening its employees with discharge or other reprisals if they become or remain members of the Union or give any assistance or support to it.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Reestablish its own Blue Creek No. 1 mining operation, and reinstate the employees who were terminated when it unilaterally shut down that operation on or about March 4, 1980.

(b) Upon reestablishment of its own Blue Creek No. 1 mining operation, offer Robert P. Tice, Bill DeWitt, Ronnie Potter, Teddy Ross, Michall Mittrell, David Williams, Buddy Smith, Ronald Hayworth, Roy Hey, Chris Hughes, Samuel Adams, and Larry Nutter immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed by them.

(c) Make the aforenamed employees whole for any loss of earnings or benefits they may have suffered due to the discrimination practiced against them in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Recognize the Union and, upon request, bargain collectively with it as the exclusive bargaining representative of Respondent's employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Notify the Union before making any changes in, or which would effect, the terms and conditions of employment of the employees in the appropriate unit, and afford the Union the opportunity to bargain about such matters.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Blue Creek No. 1 mine, located 4 miles west of Foyil, Oklahoma, copies of the attached notice marked "Appendix."[6] Copies of said

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material. Copies of the notice shall also be mailed to the last known address of all employees in the appropriate unit.

(h) Notify the Regional Director for Region 16, in writing within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to recognize and bargain collectively with International Union of Operating Engineers, Local 627, AFL-CIO, as the bargaining representative in the following appropriate unit:

All production and maintenance employees employed by Double D Mining, Inc., at its Blue Creek No. 1 mine located four miles west of Foyil, Oklahoma, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT discharge or lay off and thereafter fail or refuse to reinstate our employees because they engaged in activity on behalf of the Union or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT refuse to bargain collectively with the Union by shutting down our Blue Creek No. 1 mining operation, terminating the employees, and reopening the mine under the operation of a subcontractor, or by making any other changes in the terms and conditions of employment of the unit employees without first notifying and consulting with the Union and affording it the opportunity to bargain about those subjects.

WE WILL NOT interrogate our employees about their union activities and desires and the union activities and desires of other of our employees.

WE WILL NOT threaten to close our Blue Creek No. 1 mine if the employees vote the Union in.

WE WILL NOT threaten our employees by telling them of having made more arduous, onerous, and less desirable work assigments in order to discourage them from becoming or remaining members of the Union or giving any assistance or support to it.

WE WILL NOT threaten to break the legs of any of our employees or to engage in any other violence against them because of their union or other concerted activity for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT threaten our employees with discharge or other reprisals if they become or remain members of the Union or give any assistance or support to it.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL reestablish our own Blue Creek No. 1 mining operation and reinstate our employees who were terminated when we unilaterally shut down that operation on or about March 14, 1980.

WE WILL, upon reestablishment of our own Blue Creek No. 1 mining operation, offer Robert P. Tice, Bill DeWitt, Ronnie Potter, Teddy Ross, Michall Mittrell, David Williams, Buddy Smith, Ronald Hayworth, Roy Hey, Chris Hughes, Samuel Adams, and Larry Nutter immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed by them.

WE WILL make the aforementioned employees whole for any loss of earnings or benefits they may have suffered due to our unlawful discrimination against them together with interest.

WE WILL recognize the Union and, upon request, bargain collectively with it as the exclusive representative of all our employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL notify the Union before making any changes in, or which will effect, the terms and conditions of employment of our employees in the unit described above, and WE WILL afford the Union the opportunity to bargain about such matters.

DOUBLE D MINING, INC.